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IN THE

Supreme Court of the United States

October Term, 1963

No. 362

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation, ET AL.,
Petitioners,

v.

WEBB'S CITY, INC., a Corporation.

MEMORANDUM OF PETITIONERS IN OPPOSITION TO SUGGESTION OF MOOTNESS

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Respondent, the original plaintiff in this action, now suggests in its memorandum of January 3, 1964, that this Court regard this cause as moot and that the judgment of the District Court of Appeal of Florida be vacated. However, respondent's memorandum does not demonstrate that the cause is moot.

The injunction involved prevents the petitioners from peacefully picketing to protest any policy of respondent, whether this policy be discrimination in its cafeteria or discrimination in upgrading Negro employees in menial capacities. Thus, the alleged integration of the cafeteria does not render moot the controversy between the petitioners and the respondent, in view of the breadth of the injunction, which restrains petitioners from:

> (a) Displaying signs, posters or handbills requesting that members of the public not trade with

> the plaintiff, either on the premises of the plaintiff or on the sidewalk immediately adjacent thereto.
>
> (b) Picketing the premises of the plaintiff located at 128 Ninth Street, South, St. Petersburg, Florida. . .

This was the order which was sought and obtained by respondent, and the legality of which is challenged by petitioners. Indeed, though respondent claims to have served Negroes in its cafeteria since early 1962, it apparently did not feel that the controversy between itself and petitioners was over, for respondent continued to litigate in the Supreme Court of Florida, in the District Court of Appeal of Florida, and finally in this Court in order to keep the injunction in full force. Only at the point when this Court decided to review on the merits the validity of the restraint on petitioners' right to engage in peaceful picketing was any court informed of respondent's change in policy, and the issue of mootness was raised for the first time.

The suggestion of mootness is based on a faulty analysis of the real issues before this Court. This case does not involve an adjudication of the constitutional right to be served without discrimination in a privately-owned cafeteria. Thus, respondent's announced change in policy in this aspect of its operations has no relation to the question brought here for review. The crux of this case is not the legality of respondent's attitudes on racial discrimination, but the legality of petitioners' engaging in picketing to inform consumers of their views of a merchant's policies and to effectuate changes through public support. As was said in *Thomas* v. *Collins*, 323 U. S. 516, 537, " 'Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts.' This right has been upheld not only in the context of racial discrimination but also as to protests against the showing of certain motion pictures or the sale of goods on Sunday. *Ex Parte Lyons*, 81 P. 2d 190 (1938). See also *Rosman* v. *United Strictly*

Kosher Butchers, 298 N. Y. S. 343 (1937). In none of these cases was there court review of the policies being protested—the decisions concerned themselves solely with the right to protest.

Picketing is a means through which minority groups may seek to secure public support for their efforts to obtain an improvement in their status. It is not merely in isolated use in the instant case, but is frequently resorted to as a method of communication by groups advocating a lawful goal. It is neither as indirect nor as expensive as other methods of communication, but petitioners contend that the First and Fourteenth Amendments afford the same protection to peaceful picketing as to any other form of speech. *Thornhill* v. *Alabama,* 310 U. S. 86. What is of vital concern is whether such groups may, consistent with the Fourteenth Amendment, engage in peaceful picketing free of judicial interference and restraint. The validity of their right to exercise this form of freedom of expression is ripe for determination by this Court.

At present, under Florida law racial groups may not picket to advance their beliefs. Vacating the judgment below without considering the case on its merits would merely save petitioners from a charge of contempt if they again picket Webb's City, but would not affect the pursuasive force of the decision. The judgment of the District Court of Appeal of Florida supports the issuance of injunctions which petitioners contend are violative of First and Fourteenth Amendment rights. It will continue to immobilize racial groups which wish to picket peacefully in their effort to improve their status, unless it is vacated or reversed by this Court on the merits.

As was held in *In re Barnett,* 124 F. 2d 1005 (2nd Circuit, 1942), Rule 41 of the Federal Rules of Civil Procedure which states that an action may be dismissed after an answer is served only by permission of the court, manifests the intent to provide that the mere effort of the plaintiff to

withdraw the suit should not make the cause moot. Fla. Stat. Ann., Rules of Civil Procedure 1.35(a)(2) embodies the same intent as Rule 41.

It is submitted that respondent has shown no grounds for preventing a consideration of this cause on the merits, other than its disinclination to have the issues decided by this Court. Neither petitioners nor other groups seeking to use picketing for their own betterment and to advance social beliefs will be free of court interference in Florida unless this Court rules on the very real controversy in this cause.

Respectfully submitted,

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